No. 12772

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN ACHESON, as Secretary of State of the United States of America,

Appellant,

vs.

MARIKO KUNIYUKI,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANT

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JURISDICTION

The jurisdiction of the District Court is conferred by Section 903, Title 8, U. S. Code. (Sec. 503, United States Nationality Act of 1940) and of this Court by Section 1291, Title 28, U. S. Code.

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Western District of Washington, Northern Division, entered on the 15th day of September, 1950, adjudging and declaring that appellee did not lose her American nationality by voting in political elections in Japan in 1946.

The action was instituted by appellee while residing in Japan after she had been denied a visa to return to the United States. On appeal to the Secretary of State, upon a showing that such action had been instituted by her, she was granted a travel permit to enable her to come to the United States for the purpose of prosecuting her action, all under the provisions of Section 903, Title 8, U.S.C.

STATEMENT OF THE CASE

Appellee was born in the City of Seattle, State of Washington, of Japanese parents, July 2, 1916. At the age of two years and in the year 1918 appellee was taken to Japan by her parents, where she remained until the year 1940, a period of twenty-two years, her parents returning to the United States.

Appellee returned to the United States in 1940 remaining for a period of eight months when she returned to Japan, where she married one Ryozo

Sawa, a Japanese citizen (R. 53) in 1942. This husband died in 1944. (R. 53). In the years 1946 and 1947, appellee voted in Japanese political elections, as the result of which, the United States Consulate, acting under the provisions of Section 801(e), Title 8, U.S.C., determined appellee to have expatriated herself and refused her a visa entitling her to return to the United States. Appellee thereupon caused this action to be commenced in the United States, appealed to the Secretary of State for and was granted a travel permit, or certificate of identity, permitting her to come to the United States to prosecute her action, under a five hundred dollar bond. Appellee arrived in Seattle August 6, 1950, and the case was tried before visiting Judge Peirson M. Hall, August 24, 1950. No witnesses, save appellee, testified in her behalf, and she frankly admitted under oath that in 1946 she voted in the Japanese elections (R. 67) and again in 1947. (R. 68)

Appellee testified she did not vote in 1948 because she had heard after voting in 1946 and 1947 that voting in a political election in Japan would result in the loss of her American nationality and this was confirmed when she consulted the United States Consul in 1947. (R. 69) The affidavit of appellee contained in defendant's exhibit "A" dated July 11, 1950, which was read into the record by counsel for

appellee (R. 74-75) contains a statement of her reasons for voting and concludes with these words, "*I did not vote under duress. It was only after the deed had been done that public notice was given to we orphans that if we had voted, we had violated the Nationality Act.*"

On cross-examination appellee was asked whether or not she had an opportunity to return to the United States after 1945, and her reply was: "I lost my citizenship, therefore, I lost my opportunity." (R. 86)

Appellee claims dual citizenship and when asked if she ever registered with the Japanese government as an American citizen she answered in the negative. (R. 87)

There was marked for identification as Exhibit "C" what we claim was a ruling by the Secretary of State on the status of Japan as being a "foreign state" within the contemplation of Section 801(e), Title 8, U.S.C., which the Court refused to admit in evidence. (R. 114)

At the conclusion of oral argument, the Court rendered an oral opinion which is too lengthy to set out herein, wherein the Court determined that the appellee in voting in the political elections in Japan

did not do so under duress, but determined the political question of the status of Japan, holding that Japan was not a "foreign state" and that appellee did not thereby expatriate herself. (R. 8-25)

Thereafter, and on September 15, 1950, findings of fact, conclusions of law and judgment were entered. (R. 44) Notice of appeal was filed November 10, 1950.

QUESTIONS PRESENTED

1. Is Japan a "foreign state" within the meaning of that term as used in Section 801(e), Title 8, U. S. Code (Sec. 401(e) Nationality Code of 1940?
2. Did appellee expatriate herself by voluntarily voting in the political elections (six of them) in 1946?

POINTS TO BE ARGUED

The District Court erred in finding, concluding and adjudging:

I.

That Japan is not a "foreign state" within the meaning of the Nationality Code.

II.

That appellee did not lose her American nationality by voting in the Japanese elections.

III.

In its finding III that appellee "did not act freely and voluntarily in voting."

IV.

In its finding V, in that the statements contained therein are not based upon any competent evidence and are wholly argumentative.

V.

In its conclusion of law II.

SUMMARY OF ARGUMENT

1. The question of the status of Japan is a political and not a judicial question.
2. Appellee acted freely and voluntarily in voting in Japan in 1946 and 1947 after she had resided there almost continuously for a peiod of approximately twenty-eight years.
3. Appellee admitted in her affidavit prepared in Japan in 1948 and again on the witness stand at the time of trial that she did not vote under duress.
4. The intention of appellee to retain her American nationality is not a controlling factor.

ARGUMENT

The most important question presented on this appeal is the political status of Japan.

The District Court determined this question as a judicial and not a political one, contrary to all authority save and except decisions of United States District Courts in the State of California, hereafter referred to.

Appellant offered in evidence a copy of a letter from the State Department to the Attorney General dated June 3, 1949, which was marked for identification as Exhibit "B" (R. 110) and Exhibit "C" for identification (R. 114) which was rejected by the Court. This we claim was error.

In its letter of June 3, 1949, the State Department asserts that on the specific question of whether or not Japan is a "foreign state" it is that Department's view that the international personality or statehood of Japan did not cease as a result of the Allied military occupation; that it is well recognized in international law that once a state has come into existence, it continues until it has been extinguished by absorption or dissolution, citing *Hackworth, Digest of International Law* Vol. 1, p. 127; *Oppenheim, International Law, Sixth Edition* (Lauterpacht), Vol. 1, pp 147-150; that the mere fact that supreme governmental authority rests in a military occupant does not result in the dissolution of a state or its absorption within the occupying power.

According to *Hyde*, International Law, chiefly as interpreted by the United States, Vol. 1, Second Revised Edition, p. 22, 23, a state (in international law) should according to existing practice, possess the following qualifications:

First: There must be a people. According to Rivier, it must be sufficient in numbers to maintain and perpetuate itself.

Second: There must be a fixed territory which the inhabitants occupy.

Third: There must be an organized government exercising control over, and endeavoring to maintain justice within the territory.

Fourth: There must be capacity to enter relations with the outside world. The management of foreign affairs may, however, be lodged in any appropriate quarter, and even confided to a state that is other than, and foreign to the country that professes to be one. Independence is not essential. In a word, the existence of statehood is not dependent upon the possession by the country of a right to maintain contracts with others through agencies of its own choice, or within its own control, or exercising their functions from a place within its own territory.

It is our contention that there is a Japanese people, occupying a fixed territory, and possessing a requisite degree of civilization, which does not seem to be open to question. Neither is there any doubt as to the existence of an organized government exercising control over Japan, the District Court to the contrary notwithstanding.

The capacity of Japan to enter into relations with the outside world was clearly recognized by the United States in a statement released to the press by the State Department on May 6, 1949. (Ex. "A" R. 111) That article reads in part:

> "The State Department has recommended to the Far Eastern Commission countries, under S.C.A.P's supervision, Japan be permitted to attend international meetings and conventions and to adhere to and participate in such international arrangements and agreements as other countries may be willing to conclude with Japan."

Japan has long been recognized by the Government of the United States as a fully sovereign and independent state. As long ago as December 5, 1899, President McKinley, in his annual message to Congress, made the following statement:

> "The treaty of commerce and navigation between the United States and Japan on November 22, 1894, took effect in accordance with the terms of its XIXth Article on the 17th of July last, simultaneously with the enforcement of like treaties with the other powers, except France, whose convention did not go into operation until August 4th, the United States being, however, granted up to that date all the privileges and rights accorded to French citizens under the old French treaty. By this notable conventional reform Japan's position as a fully independent sovereign power is assured, control being gained of taxation, customs revenues, judicial administration, coasting trade, and all other domestic func-

tions of government, and foreign extra-territorial rights being renounced."

This government continued to recognize Japan as a fully independent sovereign power and maintained regular diplomatic relations with her up until December 7, 1941, when war broke out between the two countries. Although the outbreak of war resulted in a rupture of diplomatic relations, this government has never taken the position that Japan as a foreign state passed out of existence as a result of the war or of the military occupation which followed the surrender of Japan.

It is well recognized in international law that once a state has come into existence it continues until it has been extinguished by absorption or dissolution. (*Hackworth, Digest of International Law*, Vol. 1, p. 127; *Oppenheim, International Law*, Sixth Edition (Lauterpacht, Vol. 1, pages 147 to 150)). Thus, the mere fact that supreme governmental authority temporarily rests in a military occupant does not result in the dissolution of a state or its absorption into the territory of the occupying power. See also Hyde, Int. Law, Vol. 1, Second Revised Ed. p. 22, 23.

In the early case of *Jones v. United States*, 137 U.S. 202, the Court said:

> "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose law they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislative or executive, although these acts are not formally put into evidence nor in accord with the pleadings."

It must be remembered that Japan's surrender to the Allied Powers on September 2, 1945, did not result in transfer of all governmental authority to the Allied Powers, and that the Japanese Government retained considerable jurisdiction, particularly in domestic matters; likewise, the Japanese legal system was not declared to be without effect as a consequence of the surrender, but rather was modified as the occasion required in the postwar period. Thus the Supreme Commander's order of January 12, 1946, merely caused existing machinery for the conduct of the House of Representatives elections to be put into operation.

In the more recent case of *Cetjen v. Central Leather Co.*, 246 U.S. 297, the Court there said:

> "The conduct of foreign relations of our government is committed by the constitution to the executive and legislative — the political — department of the government and the propriety of what may be done in the exercise of the political power is not subject to judicial inquiry or decision * * *. It has been specifically decided

that 'who is a sovereign *dejure* or *defacto* of a territory is not a judicial, but a political question, the determination of which by the legislative and the executive departments of any government conclusively binds the judges, as well as other officers, citizens and subjects of that government.' This principle has always been upheld by the court and has been affirmed under a great variety of circumstances.

"It is also the result of the interpretation by this court of the principles of international law, and when a government which originates in revolution or revolt is recognized by the political department of our government as the *dejure* government of the country in which it is established, such recognition is retroactive in effect and validates all the acts and conduct of the government so recognized from the commencement of its existence. To these principles we must add that: every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. To permit the validity of the acts of one sovereign state to be re-examined and, perhaps, condemned by the courts of another would, very certainly, imperil the amicable relations between governments and vex the peace of nations."

See also *Picaud v. American Metal Co., Ltd.*, 246 U. S. 304, where it is said:

"It is settled that the courts will take judicial notice of such recognition, as we have here of the Carranza Government, by the political depart-

ment of our government *(Jones v. United States,* 137 U.S. 202) * * *."
To the same effect:

American Banana Co. v. United Fruit Co., 213 U. S. 347.

In its oral opinion the trial court said:

"The words which require judicial construction and determination as to their meaning, there are three — 'political election', the word 'foreign' and the word 'state'. Taking them in the order in which they are easiest to determine, I will take the word 'foreign' first. There is not any doubt that what Japan is foreign to the United States in the sense that it is the opposite and is intended to have the opposite meaning of the word 'domestic', which includes the territory of the United States. So, whether Japan is or was during that period of time a foreign state or not, it nevertheless was foreign.

"The question is whether or not it was a 'state' It is the contention of the defendants here that Japan was a state. The definition, I think, of the word 'state', a great many textbooks on international law and writers have dealt with the word for many years, but actually it has been changed much since it was defined by Vattel in his French work beginning about 1773. It is continued on through Moore's Digest of International Law, Revere, Hackworth and the like. I do not wish to ever be in the position of citing simply myself in my rulings, but in this particular case, *U. S. v. Kusche,* 56 Fed. Supp. 201, the question was raised whether or not Hitler's third Reich was a state, that is to say, whether or not it was the same German state as that from which the person involved there had renounced his allegiance. I held that it was but it reviewed the

elements necessary to constitute a state and come to the conclusion to which I still adhere, that is, a state comprehends a body of people living in a territory who are not subject to any external rule but who have the power within themselves to have any form of government which they choose and have the power to deal with other states. In other words, they have sovereignty. That is the first essential, I think, in a state and I think that is recognized by the cases on which the government relies — *Jones v. United States*, reported in 137 U. S. 202 and 212. The Court says, 'Who is the sovereign, dejure or defacto of a territory is not a judicial but a political question the determination of which by the legislative and executive departments of any government conclusively binds the judges,' and so forth. But the kernel of the definition as included there is sovereignty. Likewise, in the Venustiana Carranza case — *Octjen v. Central Leather Company* — in that case the Government of the United States acting through the regularly elected officials had officially recognized,— that is to say, the President of the United States had officially recognized the Government of Carranza as the Government of Mexico, which is certainly quite different than the situation which has obtained here." (R. 8-25)

This ruling entirely ignores the fact that as early as 1899 President McKinley did the same thing with respect to Japan, and also the well recognized rule of international law heretofore set out herein.

The trial court then proceeds to discuss the question of "sovereignty" and concludes, contrary to all recognized authority that Japan lost its sovereignty

in the terms of surrender. (R. 18) The Secretary of State is of the contrary view.

Concluding, on this phase of the case the District Court said:

> "And whatver else it may be called, in the rather mixed up international situation as it is today, it cannot be called a 'foreign state' within the contemplation and meaning of the terms of Section 801(e) of Title 8 of the U. S. Code."

We, of course, violently disagree with this conclusion of the trial judge, and believe that in this conclusion the Court fell into error. Neither the Kusche, Arikawa, Ouye, Yamamoto, Brehmoor Fujizawa cases were reviewed by this court, and we believe they were improperly decided by the District Court.

It seems to us, therefore, that this being a political and not a judicial question, and Japan having been recognized by the Executive Department through President McKinley as early as 1899, as a sovereign state, and in view of the fact that the terms of surrender of Japan in World War II did not result in either extinguishment, dissolution or absorption, that Japan has at all times been and is recognized by the political branch of our government as a "foreign state", and that recognition cannot be overthrown by judicial decision, as so clearly pointed out by the

United States Supreme Court in the cases hereinbefore cited herein.

On the second phase of the case, we believe the District Court erred also. In the Court's oral decision, which was carried into its written findings of fact, conclusions of law and judgment, the Court said:

> "There is another word, I think, that needs definition and that is 'Political Election.' In view of the fact that the election was called at the direction of General MacArthur, that all of the candidates had to be screened, and that he had the power to dissolve the Diet, call a new election and purge — that is to say put everybody out of public office who might have been elected — it seems to me that the election held in Japan does not come within the meaning of a political election as used in 801(e). It is more in the nature of a plebiscite. I think the words 'political election,' as used in 801(e) mean an election by which the people do not just exert or express their wish but actually exercise a command that certain people shall hold certain public office. Now, actually, what the elections were in Japan were not a command by the people, which they were capable of enforcing, that certain persons should hold certain public offices, but merely, in view of the power of the Commander to negate it, was merely the expression of a wish, or at best, merely a plebiscite. I think probably we call them 'Polls' in this country today. So I don't think that the election at which this lady voted in Japan or the elections were the type of elections that were contemplated by Section 801(e) or meant by that.

That disposes of that feature of the case." (R. 22)

It is somewhat difficult for us to follow the learned trial judge on this fine distinction between a "political election" and a "plebiscite", which apparently is likened by him somewhat to "polls" conducted in the United States by Gallup.

The word "political" has been defined as follows:

> "The word 'political' is defined by Bouvier to be pertaining to policy or the administration of government."
>
> *People v. Morgan*, 90 Ill. 558.

A "plebiscite" is said to be:

> "An expression of the popular will on a given matter of public interest by means of a vote of the whole people. It is usually resorted to in important changes, as those dealing with the constitution, etc. The principle has been adopted in the Swiss Constitution. It is, however, most familiar in French and Italian history during the 19th century."
>
> Funk & Wagnall's New Standard Dictionary.

In the case of *Neely v. Henkle*, U. S. Marshal for the Southern District of New York, 180 U.S. 109, 45 L. Ed. 448, having to do with extradition of a fugitive from Cuba, then occupied by United States troops, it was held that judicial notice may be taken that the Island of Cuba was at the date of the Act

of Congress of June 6, 1900, occupied by, and under the control of the United States, the court saying: (p. 115)

> "So that the applicability of the above Act to the present case — and this is the first question to be examined — depends on the inquiry whether, within its meaning, Cuba is to be deemed a *foreign country or territory.*
>
> "We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.
>
> "On the 20th days of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was therefore resolved:
>
> " '1. That the people of the island of Cuba are, and of right out to be, free and independent. 2. That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United

States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.' " 30 Stat. at L. 738.

Then followed on April 25, 1898, the declaration of war against Spain. 30 Stat. at L. 364, Ch. 189. The Court further, and at page 120, said:

> "In his message to Congress of December 6th, 1898, the President said that 'as soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves,' and that 'until there is complete tranquility in the island and a stable government inaugurated, military occupation will be continued.' "

It would seem without further argument, the situation with respect to the political status of Cuba in 1898 is parallel to that of Japan in 1946 and 1947, the proper authorities having determined that Japan is a "foreign state."

We, therefore, respectfully submit that the District Court erred in ruling otherwise.

The District Court, on this phase of the case, said in his oral opinion:

> "Before coming to the other feature of the case, I would like to say in that connection that I think I am supported in my views here, not only by the Arikawa case, but the Ouye, the Yamamoto, Brehm v. Acheson and Fujizawa case, all heretofore decided by various District Courts."

In dealing with the voting by appellee, the trial court, in its oral opinion said:

> "The other question in the case is whether or not the act of the plaintiff in voting was a voluntary act. In the first place, I am satisfied that the statute is not meant to be and was not meant by Congress to be an arbitrary deprivation of a person's citizenship in the United States by doing an act which they did not know the meaning of at the time they did it. In other words, it had to be knowingly done and it had to be voluntarily done.
>
> "I don't think I would be justified, from any evidence in the case, in holding that there was any duress, that there was any physical threat upon the plaintiff in the case, or that there was any physical threat of bodily harm or physical threat of the deprivation of her liberty, her home, her job, her food or her clothing or any other of the many various means which modern civilization and I guess ancient as well, has of hurting people physically in order to coerce them to do things. There was no question as to that at all.
>
> "The question was whether it was voluntary on her part. You have here a woman who was

born in the United States, and when she was two or three years old, was taken to Japan where she lived all of her life except for eight months just prior to the commencement of the war in 1941. She was taken to and remained there until 1950. She was a Japanese citizen. There is no doubt but what she had dual nationality both in the United States and that as a Japanese citizen she was subject to the Japanese laws which regulated and ruled Japanese citizens. I think in her situation, with the fact that the great emphasis in that election in Japan was placed upon the rather subordinate place which women had had in the country theretofore, and the fact that they were now to be given equality of rights, that she did not do a voluntary act.

"I think at the time she had, as she had indicated here, admiration for the conduct of the occupation of Japan by the Supreme Commander for the Allied Powers.

"I do not think she would have willingly or knowingly done any act at all which might ever possibly have endangered her American citizenship.

" * * * I do not think that his woman should been penalized by a denial of her citizenship on the ground that she voluntarily and freely voted in that election when there was so much confusion, and that when, quite obviously, she did not know that she would be losing her citizenship. And on that point I am constrained to hold that the plaintiff did not voluntarily vote in the elections in Japan, which the evidence shows she did."

The District Court's findings of fact and conclusions of law follow this reasoning, which we claim are not findings of fact at all, but are purely argu-

mentative. The facts in the case are plain and simple and the evidence short and concise. Summarized, the evidence shows:

1. Appellee was born in the United States in 1916, of Japanese parents, and by reason of having been born in the United States was a United States citizen.
2. When appellee was two years of age (1918) she went to Japan, where she remained until 1940, a period of twenty-two years, returning to the United States in that year. Eight months later (in 1941) she returned to Japan.
3. In 1946 (when she was 30 years of age) she voted in six Japanese elections and when she was thirty-one years of age (1947) she voted in three more Japanese elections.
4. Appellee, in voting in these nine Japanese elections, admits that she did not vote under duress.

The Congress, in enacting the Nationality Code of 1940, very definitely provided that a person who is a National of the United States, whether by birth or naturalization, shall lose his nationality by (a) "voting in a political election in a foreign state." (Sec. 401(e) Nationality Code, Title 8, Sec. 801(e), United States Code.

At this juncture, let us pause for a moment and analyze the District Court's oral decision on the question of appellee's voting, in the light of what the

United States Supreme Court said in the case of *Jones v. United States*, 137 U.S. 202, and what various text writers have said with respect to taking judicial notice, as appearing from the public acts of the legislative or executive "although these acts are not formally put into evidence, nor in accord with the pleadings."

The District Court, in its oral opinion, and carried into its findings V and VI, laid great stress on what was found in Exhibit 2 (R. 8) and having stated several times that he, himself had been in Japan during the war and felt he could therefore take judicial notice of many things — the one important thing he did not take judicial notice of was the Japanese law controlling the House of Representatives Election of April 10, 1946, being Law No. 47 of 1925; this law has been amended many times since its passage, but is still the basic law for the election of the House of Representatives of the Japanese Diet. The law has been circulated by the Far Eastern Commission as document No. M. T.-007 of March 22, 1947.

Article 18 of the House of Representatives Election law provides, *inter alia*, that:

> "The date of a general election shall be promulgated not less than 25 days in advance."

This Court, as recently as February 15, 1950, had occasion to deal with this precise question in connection with one voting in political elections in Mexico, in the case of *Miranda v. Clark*, Attorney General, 180 F. (2d) 257, wherein former decisions were reviewed, which dealt with similar cases prior to the passage of the Nationality Code of 1940.

In affirming the Arizona District Court in denying relief to the appellant there, this court said:

> "In our view, the statutory previsions above noted leave no doubt the Congress thereby removed and intended to remove, the barrier to a voluntary expatriation by a national who is over the age of eighteen years. After arriving at that age, a voluntary act of expatriation binds him. Sec. 803(b).
>
> "Any other construction of the language of the act (as applied to the situation in the case at bar) would amount to an amendment of the Act by judicial interpretation and import into it obscurities which we believe would thwart a clearly expressed Congressional will."

CONCLUSION

In conclusion, it is respectfully submitted that the District Court erred in refusing to admit in evidence or consider appellant's exhibits hereinbefore referred to; in holding that Japan is not a "foreign state" within the contemplation of Section 801(e) of Title 8, U.S.C., and finally that the appellee did not lose her American citizenship in voting in the Japanese political elections in 1946 and 1947, and the judgment should be reversed.

Respectfully submitted,

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